

TWCV Ex. 46 (E. Milstein Deposition, 5/30/96), at 41-42. The relevant TWCNYC filing, a Reply to Opposition, was filed on May 5, 1995.

D. Behrooz Nourain.

113. Mr. Nourain testified at the hearing that he was aware of Liberty's unauthorized activation of microwave facilities by "the latter part of April 1995." Nourain, Tr. 608. Mr. Nourain was certain that he obtained this knowledge by April 28, 1995. Id. at 648.

114. In fact, Mr. Nourain was aware of Liberty's unauthorized operations since April 26, 1995, at the latest. On April 26, 1995 Mr. Nourain drafted a memorandum to Mr. E. Milstein which lists the addresses of microwave facilities for which STA was being requested to serve "current customers." TWCV Ex. 35. In the April 26, 1995 memorandum, all the microwave facilities for which STA would be requested were listed as having "pending" applications on Mr. Lehmkuhl's February 24, 1995 Inventory. TWCV Exs. 34, 35.

115. When Mr. Nourain drafted the memorandum, he knew that Liberty was operating all but two of the paths listed without authority. Mr. Nourain shared this information with Messrs. Price and E. Milstein. Nourain, Tr. 836. Therefore, Messrs. Nourain, Price and E. Milstein all knew as early as April 26, 1995, that Liberty was operating without required authorizations.

116. What has not been explained is how Mr. Nourain had obtained this knowledge. Mr. Nourain testified at the hearing that he learned via a document that was faxed to his office from within Liberty.

Q: Okay. And do you remember how you learned of this?

A: I had internal documents faxed to me which -- what I recall indicated that there was some problem with some paths that Time Warner. And that was how.

Q: Were you able to figure out from this document that there was a problem with the certain paths?

A: Yes. There were some paths -- there was some information in there which will indicate that there were some paths which were -- and --

Id. at 645-46; see id. at 744.

117. Mr. Nourain did not receive advance notice that the document was coming nor did he know the identity of the sender. Nourain, Tr. 744, 760-62.

Judge Sippel: ... It's hard to understand how this all of a sudden just appeared in your machine one day without you being able to explain more about how it came to you.

Witness: No. It came up -- I know that it came up internally. It might have come --

Judge Sippel: Yes, but by who? When you say internally, that -- can you -- can you attach a name and a face to that?

Witness: It would come from 575 Madison. So it might have come from Mr. Price's office. It might have come from somewhere.

Judge Sippel: You don't have any idea.

Witness: I don't have -- because I didn't have the cover letter for it.

Id. at 761-62.

118. Mr. Nourain testified that the faxed document included a list of sites against which TWCNYC had filed petitions to deny.

... I found out from that document that there is some kind of petition or some kind of a -- I will say petition for the sake of making my argument -- my statement. I don't exactly know the words. But for somehow, that Time

Warner had stopped activation of some of our paths that we -- we activated. And that prompted me to -- that's the first time to find out that some of those paths that we activated were unauthorized because of that -- that statement that came to be.

....

Yes, I saw the -- some lists of some sites were coming up. I don't remember if there was any cover sheet. But I remember that there was some kind of a -- some information was faxed to me internally which had -- had some kind of information. And I'm sure at that point, that was -- as part of the information, some of these paths were unauthorized and Time Warner was objecting to that. So -- but I don't recall what type of document was that. I should say who came that document from, whose address.

Id. at 743-44.

119. In a letter to the Presiding Judge dated February 6, 1997, Liberty's counsel stated that "Liberty does not rely on the testimony of Behrooz Nourain given in this proceeding with respect to when he initially became aware of premature service." Letter from R. Begleiter and E. Spitzer to Hon. R. Sippel, February 6, 1997 (Attachment A hereto). Liberty's counsel further explained: "Mr. Nourain vigorously adheres to the truthfulness of his testimony. However, in this candor hearing, we are uncomfortable with the accuracy of his recollection." Id.

120. Similarly, at the hearing and outside the presence of Mr. Nourain, Liberty's counsel stated "[w]e just think, quite frankly, that his recollection about what triggered his memory may be off." Spitzer, Tr. 768.

121. Liberty's counsel informed the Presiding Judge at the hearing that no such document, as described by Mr. Nourain, exists. Id. at 763.

Judge Sippel: ... Has this fax been produced in discovery, whatever it is called?

....

Mr. Spitzer: The answer is no, we have not been able to find any such fax which sort of fits Mr. Nourain's description of what triggered this recollection which he's been describing. Obviously the Witness -- his files have been searched by our own eyes and very, very carefully.

Id. at 762-63. Liberty's counsel further remarked: "There is no such document as far as we know," (Id. at 765), and "there simply is no copy of that fax anywhere or anyplace whether it's from Mike Lehmkuhl, whether it's corporate headquarters, whether it's Mr. Nourain's own files." Id. at 770.

E. Anthony Ontiveros

122. Mr. Ontiveros testified that he learned that Liberty had been activating microwave facilities without FCC authorization at the end of April 1995. Ontiveros, Tr. 1701, 1705. At a meeting with Messrs. E. Milstein, Price, and Nourain he was informed "[t]hat we might have some buildings out there that were turned out [sic] before we had authority to turn them on." Id. at 1702. The meeting occurred in Mr. Price's office. Id. at 1706-07. Mr. E. Milstein did not recall the meeting. E. Milstein, Tr. 1631.

123. Mr. Ontiveros recalled that there came a time when it was confirmed that Liberty was operating without licenses, but he could not recall how he learned or who told him. Ontiveros, Tr. 1711-12.

V. Liberty's Initial Response To The Discovery That It Was Operating Unlicensed Paths.

124. Mr. Nourain testified that upon receipt of the fax from headquarters, he reviewed his files, and then called Mr. Lehmkuhl, the attorney at Pepper & Corazzini who was responsible for filing license applications and STA requests with the FCC.

And what I did, I first investigated myself based on my information which would be those technical information to find out what those paths were. And

at that point, I talked to Mr. Lehmkuhl, called him on the phone to talk about it.

Nourain, Tr. 743. This conversation (hereinafter referred to as the "STA conversation") occurred a few days prior to April 28, 1995, i.e. during the week of April 24. Lehmkuhl, Tr. 1048; Nourain, Tr. 745, 785.

125. Mr. Nourain testified that during the STA conversation with Mr. Lehmkuhl he initially learned that TWCNYC had filed petitions against all of Liberty's license applications for microwave paths.

[The document] mentioned that Time Warner had petitioned against some of the paths. And then when I found out -- went through to find out which one of those paths were the ones, then I found out that there were some of those paths that we were activating here. And at that point, that was the first time I found out about Time Warner's petition on all the paths, after I -- after I investigated through that particular document that I have. And after my discussion with Mike Lehmkuhl, he told me that there was a petition on January 9 -- in January against all Liberty's paths.

Nourain, Tr. 759; see id. at 798-99.

126. During the STA conversation, Mr. Nourain expressed concern about a delay in granting applications. Lehmkuhl, Tr. 1141, 1145. Mr. Lehmkuhl reminded Mr. Nourain that TWCNYC's applications had delayed the grant of Liberty's microwave license applications. Id. at 1048.

127. In their STA conversation, Mr. Nourain asked Mr. Lehmkuhl why he had not obtained STA for certain microwave facilities. Nourain, Tr. 646-47, 745. During this conversation with Mr. Lehmkuhl, Mr. Nourain realized that Liberty had unauthorized paths, because Mr. Lehmkuhl had not filed any STAs. Id. at 798-99. Mr. Nourain identified paths for which STA was needed and instructed Mr. Lehmkuhl to file STA requests for those

paths. Id. at 650; Lehmkuhl, Tr. 1051, 1146-47, 1217-18. Mr. Nourain knew at the time that he requested Mr. Lehmkuhl to file STA requests for paths that had already been activated, but did not inform Mr. Lehmkuhl of this fact. Nourain, Tr. 800-01; Lehmkuhl, Tr. 1052, 1145.

128. Mr. Lehmkuhl did not consider requesting STAs as an option in the spring of 1995 because TWCNYC had petitioned against all of Liberty's microwave license applications. Lehmkuhl, Tr. 1109-11, 1134. According to Mr. Lehmkuhl, Mr. Nourain shared this understanding. Id. at 1111-12. Therefore, Mr. Lehmkuhl did not discuss with Mr. Nourain his decision not to file STA requests for the applications that had been petitioned. Id. at 1087.

Q: And did you ever ask Mr. Nourain whether or not he wanted you to file STA requests for these paths?

A: No, because it was my understanding that getting an STA for these paths would -- would certainly be extraordinary. There are not too many circumstances where with the way that Time Warner and Cablevision had petitioned against the applications, that I believed that we could even obtain STA.

Id. at 1086-87.

129. During their STA telephone conversation, Mr. Nourain requested that Mr. Lehmkuhl provide him with the status of all license applications. Nourain, Tr. 648. Mr. Lehmkuhl drafted a memorandum dated April 28, 1995, which listed Liberty's license applications by location and noted the status of the applications. Id.; Lehmkuhl, Tr. 1052-53; TWCV Ex. 34. The license Inventory attached to the April 28, 1995 memorandum confirmed Mr. Nourain's belief about which OFS facilities were operating without licenses. Nourain, Tr. 749-50; TWCV Ex. 34.

130. Mr. Nourain also testified that, after receiving the faxed document that alerted him to the fact that he was operating unlicensed, he reported those facts to Mr. Ontiveros, who told him they would need to talk to Messrs. Price and E. Milstein. Nourain, Tr. 646, 923. At that meeting, Mr. Nourain informed Messrs. Price and E. Milstein why certain operational facilities were unauthorized.

I -- what I told them was why was the reason that these paths were not -- were not unauthorized because after my discussion with Mike Lehmkuhl, I found out about the petition on all paths by Time Warner, and also the emission designator problem that occurred created a delay of the original path I cleared on September and was filed later on; and that those lists was also as part of that list that I had in my conversation with Mike Lehmkuhl.

Id. at 746-47.

131. After reviewing Mr. Nourain's April 26, 1995 memorandum, Mr. Price attended a conference call late in the afternoon on April 27, 1995 with Mr. Barr of Pepper & Corazzini, Lloyd Constantine, and Henry Rivera, an attorney at Ginsburg, Feldman and Bress. Price, Tr. 1365-66; Barr, Tr. 1797, 1827; TWCV Ex. 45. The three attorneys met at Mr. Rivera's office and participated in a conference with Mr. Price by telephone. Barr, Tr. at 1797.

132. During the call, Mr. Price advised that Liberty was providing service to certain locations and listed about a dozen of the locations. Id. at 1830-32, 1843-44. Mr. Price was likely reading from Mr. Nourain's April 26, 1995 memorandum. Id. at 1847-48, 1860, 1943. Mr. Barr believes that a copy of Mr. Nourain's April 26, 1995 memorandum was also a document he received at the meeting. Id. at 1858; TWCV Ex. 35.

133. During the April 27, 1995 conference call, Mr. Barr learned that Liberty was providing service on unauthorized paths. Barr, Tr. 1796.

... We had a conference call with Peter Price, and -- to discuss a number of issues, I think, relevant to the petitions. And during the course of that conversation, Peter expressed that service was being provided to a number of locations for which no authorization had been granted.

Id. at 1797. Liberty's counsel also admitted at the hearing that Mr. Barr knew of Liberty's unauthorized activations on April 27, 1995. Spitzer, Tr. 1300-01.

134. Mr. Price was certain that the addresses he listed during the conference call were actually in operation.

Judge Sippel: ... Was -- when Mr. Price told you about the unauthorized activations, was he -- was he sure of himself?

Witness: He -- I suppose he was. He indicated to me that -- that service was being provided to XY&Z locations.

Judge Sippel: So it -- your recollection is is that when he told you this, that he had -- when Mr. Price told you this, he was certain, I mean at least it sounded like he had certainty. It sounded to you like he had certainty that these -- these addresses which he identified to you had been prematurely activated? Or were activated without a license?

Witness: I had no reason to doubt the truth of the information that he was giving me. I took it at face value.

Barr, Tr. 1838-39.

135. Based on his recollection that applications for facilities to serve locations listed by Mr. Price had been petitioned against by TWCNYC, Mr. Barr advised that service should be discontinued to the relevant locations and the Commission should be informed. Since the petitions were still pending, he knew that there could not have been any authorization grants from the Commission. Id. at 1799, 1832-33, 1841, 1874.

Q: Okay. Well why did you express that opinion in the call?

A: Well, knowing that they were petitioned and therefore no grant had been issued on the one hand, and then being informed on the other that service was

in fact being provided to those locations, I put two and two together and deduced that service was being provided to these locations without authorization.

Id. at 1833.

136. After hearing Mr. Barr's view that unauthorized operation was a serious violation, Mr. Price became less certain that Liberty had actually activated the microwave paths at issue.

Q: When the issue arose was there certainty that there was premature service or was this an issue that needed to be pursued?

A: No, I don't think that there was really any certainty. I -- again, when Peter expressed that service was being provided to these locations, I conveyed to him that this was a serious violation, assuming that it is true. I recall Peter being somewhat taken back by this, and --

Judge Sippel: Peter, being Mr. Price?

Witness: Peter Price, yes; and it being discussed that there was a need to look into this, and, number one, determine if it was really true; and number two, determine how and why it happened.

Id. at 1798-99; see id. at 1834-35, 1837, 1863-64.

137. Although Pepper & Corazzini had a database indicating the status of license applications and Liberty knew from its weekly operations reports where it was providing service, an investigation was deemed necessary. Barr, Tr. 1833-34.

138. Liberty did not immediately disclose the unauthorized operations of which it was aware on April 27, 1995. Id. at 1799.

139. At the conference call meeting, the filing of STAs was discussed as a means to get authorization pending the outcome of TWCNYC's petitions. Id. at 1860. At the time, the drafting of STA requests had commenced, based on Mr. Nourain's instruction to Mr.

Lehmkuhl and the conference call participants knew that. Barr, Tr. 1805, 1852-53, 1944; Nourain, Tr. 650; Lehmkuhl, Tr. 1051.

140. The next day, April 28, 1995, Mr. Price met with Messrs. Ontiveros, Nourain, and E. Milstein. Price, Tr. 1370, 1381. At the meeting Mr. Price requested Messrs. Ontiveros and Nourain to check all the activated facilities against the licenses. Id. at 1369-70. He recalled that Messrs. Ontiveros and Nourain were apologetic. They told Mr. Price that "... indeed, service was being supplied to buildings where [Liberty] didn't have proper authorization. Id. at 1382.

141. Since he left the office before 5:00 p.m on April 28, 1995, Mr. Price received the April 28, 1995 memorandum from Mr. Lehmkuhl on Monday, May 1, 1995. Id. at 1385, 1428-29. That memorandum together with the April 26, 1995 memorandum, "said that we were in jeopardy here of providing several sites with service where we didn't have authorization." Id. at 1385-86. To Mr. Price, the April 28, 1995 memorandum confirmed that the petitions were delaying STAs. Therefore, Liberty didn't have any STAs on which to rely to serve sites. Id. at 1386.

142. Although there was no particular deadline for filing the STA requests that Mr. Nourain had requested of Mr. Lehmkuhl after April 26, 1995 (in light of the fact that service was already being provided, albeit illegally, to the buildings served by the facilities that were the subject of the requests), Liberty filed these requests on May 4. This was five business days after the telephone conversation between the lawyers and Mr. Price in which Mr. Price had advised Mr. Barr that Liberty was operating unlicensed OFS facilities. Price, Tr. 1365-66; Barr, Tr. 1797, 1827. It is admitted that these STA requests contain no reference to the

fact that the facilities for which Special Temporary Authority is being sought were already in operation.

143. On May 5, 1995, a full week after Liberty and its lawyers had discussed the fact that Liberty was operating illegally, TWCNYC filed its paper alleging that Liberty was operating unlicensed microwave facilities. Reply to Opposition, May 5, 1995.

144. Only after the TWCNYC "Reply to Opposition" had been filed did Liberty's lawyers begin work on the document in which Liberty first disclosed to the Commission the fact of its operation of unlicensed facilities. Barr, Tr. 1902-03. That document was filed on May 17, 1995, three weeks after Mr. Nourain sent his memorandum to Messrs. Price and E. Milstein listing addresses that Liberty was serving with unlicensed microwave facilities. TWCV Ex. 18.

VI. Liberty Made Materially False And Misleading Statements To The Commission In Violation Of 47 C.F.R. § 1.17

A. Liberty deliberately delayed disclosure to the Commission and continued unauthorized service from microwave facilities.

145. Upon first learning of Liberty's unauthorized activation of microwave facilities, Mr. H. Milstein testified that he did not discuss the option of informing the Commission because he "doubted that [Liberty] actually had this problem." H. Milstein, Tr. 550-51.

146. Although Liberty already knew that it was operating microwave facilities without authorization, Liberty intentionally decided to conceal this fact from the Commission. Mr. H. Milstein admitted that "[t]he reality is there and the best course is to share it immediately." Id. at 582-83. However, his actions belie this position. He testified

that Liberty "had to determine exactly what the facts were. And once those were known, they were shared with our regulator." Id. at 583.

147. Liberty already knew the facts on April 27, 1995 -- Liberty was operating several microwave facilities without authorization. Liberty consciously decided not to immediately reveal these facts to the Commission. Mr. H. Milstein explained Liberty's approach:

The way we sorted that issue out internally was to take a period -- what we didn't want to have is go to the FCC today and say there's three paths and tomorrow say there's two more paths and then there's five paths. So we took a reasonable period of time which in my mind was about two weeks so that we would get a full picture to go to our regulator with and say this is what we've done wrong. During that period we didn't interfere with whatever the day-to-day things that were going on in licensing.

Id. at 586.

148. Liberty's disclosure strategy denied information to the Commission that Liberty already possessed.

Q: So is it then your testimony that because Liberty was not certain why premature service had occurred, it was not relevant to tell the Commission in an application that service had already commenced?

A: No, I think Liberty's intent at the time was to not divulge the information on a piecemeal basis. It wanted to try and find out what happened, and then go forward with the information.

Barr, Tr. 1946, 1959.

149. Liberty was more concerned about positioning its disclosure to the FCC than it was about actually making the disclosure.

... We had done something that to my mind was clearly wrong; at best stupid and at worst unlawful. So we had to report it.... So we decided -- and I was, you know, an author of that decision -- that -- not an author in writing, but a principal in that decision -- that we should find out what exactly went on here,

how it happened, who was responsible, and at least how many sites were affected because this document itself didn't tell me that this was the beginning of the end. And I wanted to find out before we went to a public forum and invited public scrutiny by our competitor exactly what was happening. And we decided that was a better way to do it than to do some kind of numb mea culpa which really we didn't feel would accomplish anything other than perhaps blowing up in our face.

Price, Tr. 1367-69.

150. Liberty ignored Mr. Barr's advice to disclose its unauthorized operations to the Commission without delay. After receiving TWCNYC's Reply to Opposition on May 5, 1995, which alleged that Liberty was operating two microwave paths without FCC authorization, Mr. Barr believed that Liberty needed to accelerate its disclosure to the Commission.

That Liberty needed to step up what it was doing in terms of supplying information to the Commission about this. I had advised Mr. Price before hand that they needed to act quickly on this. I had because of this possibility, I had advised that there was a possibility that Time Warner could independently discover that Liberty was operating some unauthorized paths.

Q: Did you tell him this in the April 27th phone call?

A: Right it was that day.

Barr, Tr. 1902.

151. Yet, Mr. Barr did not begin working on a document to disclose the unauthorized operations to the Commission until after TWCNYC filed its Reply to Opposition. Id. at 1902-03.

152. Mr. Nourain did not discuss the possibility of turning off the paths after discovering that they were unauthorized. He lacked authority to deactivate paths and no one

told him to do so. Nourain, Tr. 905-06, 909-10. Liberty declined to turn off the unauthorized paths because the FCC didn't require it. Price, Tr. 1448.

153. Mr. Price did not consider discontinuing service as an option.

Q: Do you recall if he ever made any specific comments relating to discontinuance of service?

A: Well, he didn't want to, and I think Lloyd was skeptical of the information, just didn't want to react hastily, and run over to engineering and flip a switch. I think there was a concern that -- again they needed to verify the information that was given to us on that day, and found out what, and why, and to proceed from there.

Barr, Tr. 1945.

B. Liberty omitted the material fact that paths were prematurely activated in its May 4, 1995 requests for STA.

154. Although Mr. Lehmkuhl believed that filing STA requests was a futile activity, he filed such requests on May 4, 1995. TWCV Ex. 17. Mr. Lehmkuhl discussed filing the STA requests with Mr. Barr, and they decided that it was the "only course of action."

Lehmkuhl, Tr. 1151-52.

Well, as far as I understood, Liberty wanted to -- needed to get these authorized and licensed as soon as possible. The petitions were preventing that. I had originally felt that we would not be successful in -- in having an STA request granted because of the petitions. But after discussing it with Howard and -- well, after discussing it with Howard, we felt that we should go ahead and make those requests anyway.

Id. at 1153-54. Mr. Lehmkuhl further explained: "we wanted to get on the record that Liberty was in need of getting -- was in need of these authorizations." Id. at 1155. Mr. Lehmkuhl denied that some other factor prompted Liberty's desire to file the STA requests or that he knew the STA requests related to paths that were already in operation. Id. at 1156-57.

155. After Mr. Lehmkuhl drafted the STA requests they were reviewed by Mr. Nourain, Mr. Barr, Mr. Price, Henry Rivera from Ginsburg, Feldman and Bress, and Lloyd Constantine from Constantine & Partners. Nourain, Tr. 812-13; Barr, Tr. 1801, 1819-20, 1862, 1878, 1949; Lehmkuhl, Tr. 1178-79, 1181, 1250. Mr. Nourain signed the STA requests. TWCV Ex. 17. These persons all knew on April 26 or April 27 that Liberty was operating unlicensed facilities; and the addresses served by those facilities were also known to them. See Findings, ¶¶ 101, 114, 131-33.

156. The May 4, 1995 STA requests contained language which suggested that Liberty needed authorization so that it could begin service to customers prior to the grant of its license applications. In several places in the requests, Liberty clearly implied that STA was necessary for *future* activation of the microwave paths. TWCV Ex. 17.

157. Liberty asserted that "[i]f Liberty cannot meet its *potential* customers' demand for service, those *potential* customers will cancel their contracts with Liberty." Id. at 5 (emphasis added). Liberty also claimed that "[a] series of occurrences where Liberty fails to deliver its service within 30 days and where *potential* customers cancel their subscriptions to Liberty's service will immeasurably damage Liberty's business and reputation." Id. (emphasis added). Furthermore, Liberty alleged that "[a]ny further delay in the consideration of the aforementioned applications ... undermines Liberty's *ability to deliver service*" Id. (emphasis added).

158. In the May 4, 1995 STA requests, Liberty stated that "the equipment *will be used* to distribute applicant's own products and services." Id. (emphasis added). However, the equipment was in service as of May 4, 1995. TWCV Ex. 30. Mr. Barr did not attempt

to justify this misrepresentation. Even though the draft had been reviewed by himself and others of Liberty's lawyers who knew that Liberty had commenced operating the facilities for which STA was being requested on May 4, Mr. Barr characterized the statement as "really more of a sort of template kind of statement." Barr, Tr. 1948.

159. Liberty also stated that "*Liberty will operate the station...*" TWCV Ex. 17, at 6 (emphasis added). Mr. Barr admitted that the STA requests did not disclose that the facilities were already operating and reiterated that "it is sort of a template." Barr, Tr. 1949. The requests had been reviewed in draft by Mr. Barr and others who knew that the facilities were already operating. Findings, ¶ 155.

160. In the May 4, 1995 STA requests, Liberty asserted that "any delay in the *institution of temporary operation* would seriously prejudice the public interest." TWCV Ex. 17, at 3 (emphasis added). Mr. Barr stated again that "I think that is a template or form as well." Barr, Tr. 1951. Mr. Lehmkuhl testified that this language is standard. Lehmkuhl, Tr. 1261-62. Messrs. Barr and Nourain's justification for the misrepresentations in the STA requests, as being standard language, is invalid. Mr. Barr reviewed and provided edits to the requests, including additions. *Id.* at 1178-80. Furthermore, a form document was not used to draft these STA requests. Mr. Lehmkuhl explained that "we were basically starting from the ground up with these STAs. These were, these were unlike the STAs that I had filed previously where they were simply renewals." *Id.* at ¶ 79.

161. When he reviewed the STA requests, Mr. Barr knew that at least two of the paths were in operation, based on information he learned at the April 27, 1995 conference. Barr, Tr. 1947-48; TWCV Ex. 35.

162. Mr. Barr justified Liberty's failure to disclose the premature operation of the very paths for which Liberty requested an STA by pointing to Liberty's strategy of waiting to disclose until Liberty completed its investigation.

Still at that time I don't think the sum and substance of the commencement of service was fully fleshed out. And there was a sense that not to sort of divulge this on a -- on a piece meal ongoing basis. To try and gather what could be gathered and divulge it as far as possible all at once.

Barr, Tr. 1801.

163. Liberty could have waited until it completed its investigation to file the STA requests. Liberty did not have to file the STA requests on May 4, 1995. There is no deadline for filing an STA request. It can be filed before, concurrent with, or after the filing of an application. Id. at 1861-62.

164. Liberty did not amend the STA requests or their original license applications to reflect the fact that it prematurely activated the facilities for which authorization was sought.

C. Liberty made misrepresentations and material omissions in its May 17, 1995 Surreply.

165. Mr. Barr and attorneys from Ginsburg, Feldman and Bress, and Constantine & Partners drafted Liberty's Surreply filed on May 17, 1995. Barr, Tr. 1802, 1883, 1899; Lehmkuhl, Tr. 1215. Mr. Price and Mr. Nourain supplied the substantive information. Barr, Tr. 1802, 1883.

166. Although Mr. Lehmkuhl possessed information related to the subject of the Surreply, Mr. Barr did not consult Mr. Lehmkuhl during the drafting process. Lehmkuhl, Tr. 1214-15.

Judge Sippel: Well, your firm is filing something that's, I mean, the representations of Mr. Nourain would be, would certainly cover, at least cover

the subject matter that you had been working with Mr. Nourain over quite some period of time

Witness: Yes.

Judge Sippel: Well, it would only lead, it would only be reasonable to assume that if a partner in your law firm is going to file a document with the Commission under oath, that covers that period of time and covers the same subject matter, that he's going to show it to you and say do you see anything that I should know about or something of this nature. That's the way the world works.

Witness: Yeah, but I think that's safe to assume. The reason I'm unsure is that I don't recall specifically reviewing this before it was filed. It's entirely possible, but I don't recall.

Id. at 1217.

167. Both Mr. Price and Mr. Nourain executed declarations attesting to the truth of the statements in the Surreply. TWCV Ex. 18, at 8-9. Mr. Price reviewed the entire Surreply prior to signing the declaration. Price, Tr. 1444-45. Mr. Nourain did not review the Surreply prior to signing the declaration. However, he spoke with Mr. Barr who told him the contents of the Surreply. Nourain, Tr. 860-61.

168. The May 17, 1995 Surreply was the first disclosure to the Commission of Liberty's unauthorized activation of microwave facilities. Barr, Tr. 1802.

169. In the Surreply, Liberty asserted that "[i]n situations where contract requirements conflict with prevailing application processing times, Liberty has traditionally sought special temporary authority from the Commission to operate pending final action on the application." TWCV Ex. 18, at 3. In fact, there was no relationship between contractually mandated start dates and the filing of requests for STA. From January through April 1995, Liberty activated thirteen new microwave paths without filing a request for STA.

TWCV Ex. 30; see Lehmkuhl, Tr. 1104-05, 1258. Also, during 1995, Pepper & Corazzini would only file a request for STA pursuant to Liberty's instructions. L/B Ex. 5 (Lehmkuhl Deposition, 5/22/96), at 54.

170. Liberty also stated that "[i]t has been Liberty's pattern and practice to await a grant of either a pending application or request for STA prior to making a microwave path operational." TWCV Ex. 18, at 3. Mr. Price claimed that when he signed the declaration accompanying the Surreply, he believed that the statement was correct. Price, Tr. 1580. At the hearing, Mr. Price admitted that it was not Liberty's practice to await authorization during the time period at issue in this proceeding. Id. at 1588. He later testified that when he signed the declaration he understood that there was a divergence between Liberty's "policy" of abiding by the law and its actual pattern and practice. Id. at 1579-81. Liberty knowingly did not follow the practice of waiting to receive FCC authorization before activating a microwave path. See Findings, ¶¶ 60-63. Liberty's failure to follow such a practice deliberately ignored counsel's distinct advice to await FCC authorization prior to commencing service. TWCV Ex. 51.

171. In the Surreply, Liberty attempted to justify its premature activations in part by alleging that "[a]pplication processing for each of the above-referenced sites has exceeded the norm due to the frequency coordinator's use of incorrect emission designators." TWCV Ex. 18, at 3. This rationalization fails for two reasons. One, Liberty has not claimed that it prematurely activated microwave facilities because of the emission designator problem. Two, even if incorrect designators somehow excused Liberty's illegal actions, they do not supply an excuse for microwave facilities prematurely activated after the emission designator

problem was resolved, on March 21, 1995. Lehmkuhl, Tr. 1127-28; TWCV Ex. 37. Liberty prematurely activated at least five paths, 767 Fifth Ave., 200 E. 32nd St., 16 W. 16th St., 6 E. 44th St., and 2727 Palisades Avenue, after that date. TWCV Ex. 30. License applications for two of those facilities, 200 E. 32nd St. and 2727 Palisades Ave., were not even filed until after the emission designator problem had been solved. TWCV Ex. 30.

172. Liberty stated in the Surreply that "Mr. Nourain, perhaps inadvisably, assumed grant of the STA requests, which in his experience had always been granted within a matter of days of filing, and thus rendered the paths operational." TWCV Ex. 18, at 3. Mr. Lehmkuhl testified that he "had no idea what [Mr. Nourain] was talking about." Lehmkuhl, Tr. 1186. Mr. Lehmkuhl did not know the basis for Mr. Nourain's assumption that STA requests were filed for the paths. Id. at 1187.

173. Liberty additionally contended that "... the administrative department failed to notify Mr. Nourain that grant of Liberty's applications was being held up indefinitely as a result of the Time Warner petitions." TWCV Ex. 18, at 3. Based on his conversations with Mr. Nourain from January through April 1995, Mr. Lehmkuhl knew of no basis for Liberty's statement. Lehmkuhl, Tr. 1188-89. Mr. Nourain did not know who comprised the "administrative department". Nourain, Tr. 862-62. Mr. Barr testified that there was no way to identify the makeup of the administrative department. Barr, Tr. 1896.

174. Mr. Price asserted that the administrative department was, in effect, himself. He admitted that he knew Liberty was experiencing delays in getting applications granted, but that he didn't inform Mr. Nourain. Price, Tr. 1446-47. However, the fact of Mr.

Price's knowledge in this regard was not disclosed to the Commission in the May 17 Surreply.

175. In the Surreply, Liberty claimed that Mr. Nourain was unaware of the petitions against Liberty's application until "late April 1995." TWCV Ex. 18, at 3. Mr. Nourain testified that someone else at Liberty or at Pepper & Corazzini knew Liberty's applications were petitioned against by TWCNYC, but he did not learn this until late April 1995. Nourain, Tr. 862-63. Mr. Lehmkuhl testified that Mr. Nourain was aware of TWCNYC's petitions to deny at or about the time they had been filed. Lehmkuhl, Tr. 1096-97, 1188-90.

176. In any event, Mr. Nourain's state of knowledge regarding petitions to deny is not relevant to all microwave facilities that were prematurely activated. No petition to deny was filed against the 2727 Palisades Avenue microwave facility before May 17, 1995, and the processing of that application could not be said to have been "delayed." *Id.* at 1253-54. The facilities that were the subject of that application had been activated only days after the application had been filed. Moreover, facilities serving 441 E. 92nd Street/1775 York Avenue were activated a month *before* the application for them had been filed. These were covered by the May 4 STA requests. TWCV Ex. 30.

177. Mr. Price stated that Liberty made a complete disclosure to the FCC in its Surreply. Price, Tr. 1391; TWCV Ex. 18. The Surreply was intended to convey what Liberty knew as of May 17, 1995. Price, Tr. 1502.

Q: ... But the question simply was, as of the date of this document, that is May [17], 1995, was this document intended to convey what the company knew as of this date about the situation?

A: It was intended to convey what we knew as of this date, but by no means to foreclose what we might uncover the next day which we didn't know at the time this document was written.

Id. Mr. Price explained that the Surreply was part of the process "to inform the FCC in a thoughtful and meaningful way as to how this occurred, what the extent of the problem was and what we were doing to correct it." Id. at 1500.

178. As of January 11, 1995, Mr. Price was aware of TWCNYC's petitions to deny all of Liberty's applications and the likely effect of those petitions on Liberty's applications, although this was not mentioned in the Surreply. Barr, Tr. at 1795-96.

179. Prior to the filing of the Surreply, Mr. Price told Mr. Barr that he knew petitions were delaying the grant of Liberty's applications, but that he didn't inform Mr. Nourain. Id. at 1894-95.

180. The Surreply did not mention Mr. Price's knowledge of the petitions and their effect. See TWCV Ex. 18.

181. Liberty failed to indicate that the Surreply was only a preliminary effort to disclose its unauthorized operation to the Commission.

Q: Is there anything in the document, Mr. Barr, where Liberty tells the Commission that this information is tentative and maybe you shouldn't rely on it. It's incomplete. We're still investigating. Is there any qualification like that in this document?

...

A: No I don't see any such qualification.

Barr, Tr. 1896.

182. The Surreply did not indicate the fact that Liberty knew of its unauthorized operations prior to TWCNYC's May 5, 1995 pleading, which alleged illegal operations. Id. at 1901.

183. The Surreply did not indicate that the May 4 STA requests omitted to state that fourteen of the facilities that were covered by these requests were already in operation. See TWCV Ex. 18.

D. Liberty omitted the fact that a microwave path was prematurely activated in its requests for STA filed on May 19, 1995 and amended on May 24, 1995 and July 12, 1995.

184. On May 19, 1995, Liberty filed a request for STA for a microwave path from a transmitter at 2600 Netherlands Avenue to a receiver at 2727 Palisades Avenue on May 19, 1995. The request was drafted by Mr. Lehmkuhl and signed by Mr. Nourain. TWCV Ex. 38. At the time the request was filed, all filings to the FCC were reviewed by Mr. Barr and other outside counsel for Liberty. Lehmkuhl, Tr. 1250-51.

185. When the request was filed, no petition to deny had been filed against 2727 Palisades Avenue. Id. at 1252-53; TWCV Ex. 34.

186. In the request, Liberty failed to disclose the fact that it had already commenced service at 2727 Palisades Avenue. Lehmkuhl, Tr. 1273; TWCV Ex. 38.

187. The request implied that Liberty needed the STA to commence service. Liberty stated that "... any delay in the *institution* of temporary operation would seriously prejudice the public interest." Id. at 2 (emphasis added); see id. ("Liberty submits that the *institution* of special temporary authority requested herein is in the public interest) (emphasis added). Liberty further stated that it "*will operate* the station in conformance with the

technical specifications outlined in the referenced application(s)" TWCV Ex. 38, at 3 (emphasis added).

188. Liberty had another opportunity to disclose that it had commenced service to 2727 Palisades Avenue when it filed an amendment to the May 19, 1995 STA request on May 24, 1995. In the May 24, 1995 STA request, Liberty included an additional path from the transmitter at 2600 Netherlands Avenue. Lehmkuhl, Tr. 1271-72; TWCV Ex. 39. The request enclosed a copy of the previously filed STA request relating to the receiver at 2727 Palisades Avenue. Lehmkuhl, Tr. 1271-72; TWCV Ex. 39. Liberty did not modify its May 19, 1995 STA request to disclose that the receiver at 2727 Palisades Avenue was already in operation. Lehmkuhl, Tr. 1273; TWCV Ex. 39.

189. In a third FCC filing related to the transmitter at 2600 Netherlands, Liberty failed to disclose that 2727 Palisades Avenue was prematurely activated. Liberty amended its request for STA regarding the 2600 Netherlands Avenue transmitter to include an additional path to the receiver at 2500 Johnson. TWCV Ex. 40. In an attachment to this request Liberty noted that it filed an application to add 2727 Palisades Avenue as a receive site for 2600 Netherlands Avenue on March 24, 1995. Id. at 6.

E. Liberty omitted the material fact that paths were prematurely activated in its May 26, 1995 Reply to Opposition.

190. Liberty's Reply to Opposition addressed TWCNYC's arguments against granting Liberty's requests for STA filed on May 4, 1995. TWCV Ex. 19.

191. The Reply was drafted by Mr. Barr and reviewed by the Constantine firm. Barr, Tr. 1925-26; TWCV Ex. 19.

192. In the Reply, Liberty did not mention that the STA requests related to paths that were operating without authorization. Barr, Tr. 1920-21; TWCV Ex. 19. By referencing its currently unsatisfied contractual obligations, Liberty implied that service had not yet commenced to the locations at issue in the STA request. Liberty alleged that STA was necessary because "a number of Liberty's contractual obligations are imperiled as a result of Time Warner's filings." TWCV Ex. 19, at 3 (emphasis added). Additionally, Liberty included a chart of "locations with which Liberty has contracts to serve, the relevant contract date and the contractual commitment to install, demonstrating the urgency of Liberty's situation." TWCV Ex. 19, at 3.

193. The microwave facilities at the addresses listed in the Reply were disclosed in the Surreply as having been operating without authorization. Liberty did not reference the Surreply or inform the Commission that these paths were already operating.

Q: ... what is the point of telling the Commission in Exhibit 19 that the contract requires them to get an STA when in fact they were already providing service to these addresses?

A: Right but if they were -- if they were turned off then Liberty would be in violation of its contracts because it wouldn't be providing service as it was required to under the contracts.

Q: There's no mention of the turning off conflict in this paper in this paper [sic] is there?

A: No but I think you have to place it in context with the previously filed Surreply and it was our understanding at this time that I think that all these papers were being acted upon by one individual up in Gettysburg and that he had all this information at his fingertips.

Barr, Tr. 1922-23.